DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROGER BOWSER, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, PULICE CONSTRUCTION, Respondent Employer, ALLIANZ INSURANCE CO c/o GAB BUSINESS SVC., Respondent Carrier.	)	1 CA-IC 09-0063 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action--Industrial Commission

ICA CLAIM NO. 89342-159283

CARRIER NO. 48846-48479

Robert F. Retzer, Administrative Law Judge

AWARD AFFIRMED

Roger Bowser — Mesa
In *Propria Persona* Petitioner

Andrew Wade, Chief Counsel — Phoenix
The Industrial Commission of Arizona
Attorney for Respondent

Klein Lundmark Barberich & LaMont, P.C. Phoenix
by R. Todd Lundmark
Attorneys for Respondent Employer/Carrier

G E M M I L L, Judge

¶1 Petitioner employee Roger Bowser ("Bowser") seeks special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for scheduled permanent partial disability and supportive care. Bowser raises several issues on appeal, primarily arguing that the administrative law judge ("ALJ") provided him with misleading advice that prevented him from being awarded medical treatment for his left knee and lower back. For the following reasons, we affirm.

Facts and Procedural History

¶2 In September 1989, Bowser sustained an industrial injury when he injured the bottoms of his feet while working for respondent employer Pulice Construction. Since being injured, Bowser's industrial claim has been closed and opened a number of times.

¶3 In April 2007, Bowser's claim was reopened by respondent carrier Allianz Insurance Company c/o GAB Business Services ("Allianz") so that Bowser could have surgery performed on his left foot. The surgery was performed the next month. In March 2008, Bowser began to experience pain in his lower back

and left knee, which he believed was related to the surgery. As a result, Bowser's podiatrist, Dr. Harrill, referred Bowser to an orthopedist and also ordered an MRI on Bowser's back. Allianz, however, declined to cover the referral and MRI.

¶4 On August 22, 2008, Allianz issued Bowser a notice of claim status terminating his active medical care and temporary compensation as of July 23, 2008. The claim was closed with a 15% scheduled permanent partial disability on Bowser's left leg, compensated at the 75% rate. This was the same award Bowser had previously received from the ICA in 1999. Bowser protested the closure of his claim and requested a hearing before the ICA, which was granted.

¶5 On January 20, 2009, the presiding ALJ, Bowser, and counsel for Allianz participated in a prehearing telephone conference. According to Bowser, during the telephone conference the ALJ advised Bowser that he only needed to call one doctor to testify during the hearing and that Bowser could choose which doctor he wanted to testify. Although the telephone conference was not recorded, the available record indicates that during the conference the ALJ suggested or encouraged Bowser that he limit the number of doctors he planned to call to testify during the hearings.

¶6 Formal hearings were held on February 20, 2009, April

20, 2009, and May 14, 2009. The issues before the ALJ were whether Bowser should receive "continuing benefits and/or greater permanent disability" and whether Bowser's low back and left knee conditions were related to Bowser's 1989 industrial injury.

¶7 During the hearings, the ALJ received expert medical testimony from Bowser's podiatrist, Dr. Harrill, and also from Dr. Douglas Kelly, an orthopedic surgeon who performed an independent medical examination on Bowser in January 2009. Dr. Kelly opined that Bowser's left foot was medically stationary at approximately a 15% permanent impairment, and that Bowser's low back and left knee symptoms were not related to the industrial injury. Dr. Harrill, on the other hand, opined that it was "possible" that Bowser's low back and left knee condition were related to his industrial injury. He also opined that Bowser's left foot was medically stable, stationary, and had obtained maximum medical improvement.

¶8 Following the hearings, the ALJ entered an award for scheduled permanent partial disability and for supportive care. In its decision, the ALJ stated that it found Dr. Kelly's opinions were "most probably correct and well founded." Accordingly, the ALJ terminated Bowser's medical benefits and temporary compensation as of July 23, 2008. Bowser received 15%

scheduled permanent partial disability of his left leg, compensated at the 75% rate, and "work boot orthotics as needed, 3 office visits per year and medications including Ultracet and Ibuprofen and on rare occasions Percocet."

¶9 Bowser requested administrative review and the ALJ summarily affirmed the award. Bowser next brought this special action. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003) and 23-951(A) (1995) and Arizona Rule of Procedure for Special Actions 10.

Analysis

¶10 The claimant has the burden proving all elements of a compensable claim. *Toto v. Indus. Comm'n*, 144 Ariz. 508, 512, 698 P.2d 753, 757 (App. 1985). Compensability requires both legal and medical causation. *Grammatico v. Indus. Comm'n*, 211 Ariz. 67, 71, ¶ 19, 117 P.3d 786, 790 (2005); *DeSchaaf v. Indus. Comm'n*, 141 Ariz. 318, 320, 686 P.2d 1288, 1290 (App. 1984). Medical causation is established by showing that the accident caused the injury. *Grammatico*, 211 Ariz. at 71, ¶ 20, 117 P.3d at 790; *DeSchaaf*, 141 Ariz. at 320, 686 P.2d at 1290. In this case, Bowser challenges the ALJ's decision regarding the absence of medical causation regarding his low back and left knee symptoms.

¶11 "We deferentially review the ALJ's factual findings but independently review his legal conclusions." *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, 12, ¶ 6, 90 P.3d 211, 213 (App. 2004), *aff'd*, 211 Ariz. 67, 117 P.3d 786 (2005). The ALJ determines the credibility of witnesses, *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973), and resolves conflicts in the evidence, *Johnson-Manley Lumber v. Indus. Comm'n*, 159 Ariz. 10, 13, 764 P.2d 745, 748 (App. 1988). "When more than one inference may be drawn, the [ALJ] may choose either, and we will not reject that choice unless it is wholly unreasonable." *Id*. With these principles in mind, we address the issues Bowser raises on appeal.

¶12 First, Bowser asserts that during the January 20, 2008 telephone conference the ALJ provided Bowser with misleading advice that ultimately prevented Bowser from being awarded active medical treatment. Based on the available record, we are unable to conclude that Bowser was provided misleading or erroneous advice. As already noted, the conference call was not recorded and we have no transcript that would permit us to evaluate Bowser's claim. The transcript from the February 20, 2009 hearing includes some discussion between Bowser and the ALJ regarding the January 20 conference call, but that discussion does not reveal that the ALJ made misleading statements to

Bowser during the conference call. Bowser does not cite any portions of the record or other authority in support of his position that he received misleading advice during the January 20 conference call. Under these circumstances, we are unable to further consider Bowser's arguments concerning his conversation with the ALJ during the telephone conference. *See State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 370, 807 P.2d 531, 538 (App. 1990) (declining to address arguments raised without citation to "any authority or portions of the record"); *see also* ARCAP 13(a)(6); Ariz. R.P. Spec. Act. 7(e).

¶13 Bowser also claims that during the February 20, 2009 hearing, the ALJ advised Bowser that Dr. Harrill "was acceptable to testify on the problems that [Bowser] was having with [his] lower back [and] left knee[,]" even though the ALJ knew that a podiatrist was not qualified to testify "about orthopedic specialties." Specifically, Bowser takes issue with the following exchange:

> JUDGE RETZER: Mr. Bowser, you have requested four different doctors and I think we discussed at the prehearing conference we try and narrow that down.
>
> MR. BOWSER: Yes; Yes, sir.
>
> JUDGE RETZER: As far as – and I understand from what you told Mr. Lundmark and myself, Dr. Harrill - - H-a-r-r-i-l-l – is recommending the MRI for your back and your

> left leg. And is he also recommending continuing treatment for your left foot?
>
> MR. BOWSER: Yes, sir, and all – my doc, Dr. Andrews has recommended an MRI for my lower back also.
>
> JUDGE RETZER: Okay. Okay. So really Dr. Harrill could cover all three –
>
> MR. BOWSER: Easily.

Based upon this portion of the record, we disagree with Bowser that the ALJ was suggesting that Dr. Harrill was qualified to testify "about orthopedic specialties." Rather, given the information Bowser provided to the ALJ, it appears the ALJ was merely noting that Dr. Harrill and Dr. Andrews, Bowser's family doctor, were both going to testify that they recommended an MRI on Bowser's back and, therefore, Dr. Andrew's testimony would be cumulative. It is not uncommon for the ALJs in these proceedings to encourage the parties to limit the number of doctors who must be called for live testimony, especially when the medical records and reports of non-testifying doctors are being admitted and available for review. On this record, we do not find the ALJ's comments misleading or improper.

¶14 It appears from Bowser's arguments that he is assuming that the ALJ chose Dr. Kelly's testimony over Dr. Harrill's because Dr. Kelly is an orthopedist and Dr. Harrill is a podiatrist. But such an assumption may not be correct. In the

award, the ALJ does not state that he is discounting the testimony of Dr. Harrill because he is a podiatrist. Dr. Harrill testified that there was a "possible" link between Bowser's original industrial accident and his back and knee problems, whereas Dr. Kelly testified unequivocally that Bowser's low back and left knee symptoms were not related to the industrial injury. The ALJ may have chosen to credit Dr. Kelly's testimony over Dr. Harrill's because Dr. Kelly more forcefully and more persuasively expressed and explained his conclusions.[1] Additionally, the ALJ noted that he had reviewed the various medical reports and records contained in the ICA file and the ALJ's findings were presumably based in part on these records as well as the doctors' testimony.

¶15 Bowser also asserts that Allianz should not have denied him coverage for treatment on his lower back and left knee. The decision issued by the ALJ terminated Bowser's medical and temporary compensation benefits. In the decision,

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[1] We also note that medical conclusions regarding causation "must be based upon *probabilities* rather than upon *possibilities*." *Employers Mut. Liab. Ins. Co. of Wisconsin v. Indus. Comm'n*, 17 Ariz. App. 516, 519, 498 P.2d 590, 593 (1972). Accordingly, medical opinions should ordinarily be stated to a reasonable medical probability. *See Olivas v. Indus. Comm'n*, 16 Ariz. App. 543, 546, 494 P.2d 743, 746 (1972). The failure to use these "magic words," however, is not necessarily fatal. *See Skyview Cooling Co. v. Indus. Comm'n*, 142 Ariz. 554, 559, 691 P.2d 320, 325 (App. 1984).

the ALJ noted that Dr. Harrill opined it was possible that Bowser's knee and back complaints were related to the industrial injury. The ALJ also summarized Dr. Kelly's opinions and noted that Dr. Kelly opined that Bowser's left knee and low back complaints were not related to his 1989 industrial injury. The AlJ found Dr. Kelly's opinions to be "most probably correct and well founded." It was the ALJ's responsibility to resolve this conflict in the medical evidence and there was reasonable evidence supporting his resolution. Accordingly, we will not disturb the ALJ's finding that Dr. Kelly's opinions were "most probably correct." *See Gamez v. Indus. Comm'n*, 213 Ariz. 314, 316, ¶ 15, 141 P.3d 794, 796 (App. 2006) (citing *Ortega v. Indus. Comm'n*, 121 Ariz. 554, 557, 592 P.2d 388, 391 (App. 1979)); *see also Kaibab Indus. v. Indus. Comm'n*, 196 Ariz. 601, 609, ¶ 25, 2 P.3d 691, 699 (App. 2000) ("When reasonable evidence exists to support the ALJ's conclusion, we are bound by his resolution of conflicting testimony. Indeed, it is the duty of the ALJ to resolve conflicts in the evidence and to determine which opinion is more probably correct.") (citation omitted).

¶16 Finally, we address Bowser's concern that the portion of the ALJ's decision awarding Bowser "work boot orthotics as needed" is unclear. We agree with Bowser that this portion of the award should be interpreted as "work boots *with* orthotics."

The ALJ's award was in agreement with Allianz's notice of claim status and notice of supportive medical maintenance benefits. The notice of supportive medical maintenance benefits provided Bowser with "1 set of work boots with orthotics per year, based on continued need." We also note that Allianz did not respond to this issue in its answering brief.

Conclusion

¶17 The award and decision upon review are affirmed. The supportive care award for "work boots orthotics" should be understood as meaning "work boots with orthotics."

__/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

____/s/_____
SHELDON H. WEISBERG, Presiding Judge

____/s/_____
PHILIP HALL, Judge